MISCELLANY.

AN INTERESTING OLD STATUTE.—The provision of the Virginia Code exempting from service on the grand jury the owner or occupier of a gristmill is an interesting example of a law which has been allowed to remain on the statute book long after its usefulness and the condition that called it into being have ceased to exist. Attention has been directed to it by reason of the fact that some days ago a citizen of Norfolk claimed the benefit of this exemption—the first time it has been claimed, according to reports, in many years. When the statute was passed, serious inconvenience to the citizens of the surrounding country might have arisen as a result of summoning a mill-owner from his work, but the miller is no longer so important a member of the community.—*Law Notes.*

PARDON FOR CONTEMPT OF COURT.—In Bishop on Criminal Law (8th ed., vol. 1, sec. 913), the proposition is laid down that "contempts of court are public offenses, pardonable like any other." This we understand to be a correct general statement of the law according to a preponderating weight of authority. A comparatively recent case on the subject, treating of the validity of a pardon for contempt of court by a State governor, but citing and relying upon Federal as well as State decisions, is *Sharp* v. *State* (Tenn.), 49 S. W. R. 752. The majority of the cases have not attempted any distinction between the application of the pardoning power to different classes of contempt, and for this reason the decision of the United States Circuit Court of Appeals, Eighth Circuit, in *Re Nevitt* (August, 1902), 117 Fed. 448, is entitled to careful consideration.

The proceeding was on *habeas corpus* to relieve certain county judges of the State of Missouri from an imprisonment they were enduring until such time as they should comply with a mandamus of the United States Circuit Court for the Western Division of the Western District of Missouri, directing them to levy a tax to make a partial payment upon a judgment recovered against the county of St. Clair, and to make partial payments upon other judgments of like character based upon certain bonds of said county. They asked, among other things, for a stay of proceedings in order to apply to the president for a pardon of their contempt. The opinion of the Circuit Court of Appeals by Sanborn, J., contains an elaborate discussion of the subject in point upon its merits and in the light of authority. The distinction is sharply drawn between criminal and civil contempts, the former being defined as "those prescribed to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders," and the latter being described as "those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled."

Such distinction under varying forms of terminology is substantially recognized in most jurisdictions. As to criminal contempts the Circuit Court of Appeals, while advancing cogent considerations why the pardoning power should not apply to them, does not pass upon the question. In respect of civil contempts, it is directly held that the right of pardon does not exist. It is difficult to con-

vey the position of the court by any brief extract from the opinion, but the following language may not inappropriately be quoted:

"In *Jones* v. *Shore's Ex'rs* (1 Wheat. 462, 4 L. Ed. 136), in *U. S.* v. *Lancaster* (4 Wash. C. C. 66, 26 Fed. Cas. 859), and in 5 Op. Att'ys Gen. 532, it was held that the president had no authority under his pardoning power to release that portion of fines or penalties for violations of law which inured to the benefit of private individuals. And how can this be otherwise? A pardon is a grant, a deed. But a deed does not and cannot convey that which the grantor has never had. If it were conceded that the president by his pardon could grant to the petitioners all the right and interest of the United States in these proceedings for contempt, that grant would avail nothing here. The right to the enforcement of this mandamus by these proceedings for contempt is not vested in the United States, or in the president, and therefore they cannot grant or release it. It is vested in the plaintiff in this judgment, Joseph M. Douglas. It is the right to the only execution, the only remedy, which the law vouchsafes to him for the collection of his judgment, and no department of the government, executive, legislative, or judicial, can lawfully take, release or destroy it without paying or securing to him just compensation for his property; for this is his private property.

"The questions which these petitions present involve the liberty of the citizen and go to the very foundation of civil government; for justice is the end of all government, and if the courts which are instituted to determine what justice is between man and man may not enforce the private rights to which they find the litigants before them entitled, the great purpose of government will be unattained and our republican system will prove to be a lamentable failure."

Where a commitment for contempt unmistakably involves the enforcement of a private or individual right, there is serious ground for treating it as something besides a "public offense" and arguing that the right of executive pardon may not apply, even conceding that such prerogative ought to be recognized with regard to punishments for criminal contempts. An interesting question is as to the effect that a decision such as the present one can have. It certainly ought to have a strong moral and advisory influence, to say the least. But whenever a president or governor chooses to exercise the pardoning function, it is probable that with his control of the appointive power and the executive machinery, his act will be effectuated. Pardons have been granted by governors for criminal contempts, especially in political cases, and it is not at all outside the range of possibility that presidents and governors will assume to pardon civil contempts.

We concur heartily in the attitude of the Circuit Court of Appeals in the *Nevitt case* and in the spirit of Judge Sanborn's reasoning. It is subversive of the fundamental theory of American government to recognize the power of an executive to pardon for contempt in any case, civil or criminal. The power to enforce decrees by contempt process is inherent in all courts, and if the same may be invaded either by the legislative or the executive branches, the judiciary is deprived of co-ordinate standing and authority. Reinforced by the reasoning of Judge Sanborn's able opinion, we would renew the plea often made in this place for the constitutional regulation of the entire subject of contempt. The practical difficulty of amending the Federal constitution is universally recognized, but with regard to the amendment of State constitutions in this respect the influence of the bar should be unitedly exerted.—*New York Law Journal.*

RIGHT OF LESSEE TO RECOVER DAMAGES FOR NUISANCE. — The respective rights of landlord and tenant in regard to maintaining actions to recover damages for a nuisance have recently been considered in *Bly* v. *Edison Electric Illuminating Co.* (1902), 172 N. Y. 1, a case that has done much to define the law of New York on this perplexing question. The nuisance complained of consisted in the emission of smoke and cinders from defendant's electric light station and in the vibration of the plaintiff's house, caused by the running of defendant's machinery. The sole issue was whether the plantiff was barred from recovering damages because the leases under which she claimed were all made subsequent to the establishment of the nuisance, and a majority of the court held that she was not barred thereby.

It is not disputed that a nuisance affecting the use and enjoyment of property i rimarily an injury to possession rather than ownership; but it is equally certain that a reversioner may in some cases have a right of action. The English criterion seems to be the degree of permanence of the nuisance. If it consists in an obstruction of a permanent character, such as a wall, *Jesser* v. *Gifford* (1767), 4 Burr. 2141, or even a temporary obstruction under a claim of right, *Bell* v. *Midland Ry. Co.* (1861), 10 C. B., N. S. 287, the reversioner may sue; but if it arises not from the mere presence of a thing but from its use in a particular way, as in case of the ordinary nuisances of smoke or noise, he can recover nothing, even though the value of his reversion has depreciated thereby. *Simpson* v. *Savage* (1856), 1 C. B., N. S. 347; *Jones* v. *Chappell* (1875), L. R., 20 Eq. 539. If both landlord and tenant are injured, both may sue and divide the damages between them. *Shelfer* v. *City of London Electric Lighting Co.; Meux's Brewing Co.* v. *Same* (1895), 1 Ch. 287.

In New York the first case in which an accurate consideration of this subject was attempted was *Francis* v. *Schoellkopf* (1873), 53 N. Y. 152. There the plaintiff, owning two houses near a tannery, from which offensive smells proceeded, was allowed to recover only for the loss she had sustained in failing to rent one house and in renting the other at a reduced rate. The court declared the rule of damages to be "the difference of the rental value, free from the stench and subject to it"; and this must be regarded as the New York rule, *Woolsey* v. *N. Y. Elev. R. Co.* (1892), 134 N. Y. 323, though it has been criticized elsewhere, *East Jersey Water Co.* v. *Bigelow* (1887), 60 N. J. L. 202.

Though *Francis* v. *Schoellkopf* had shown a departure from the English view in looking more to the extent of the damages than to the nature of the nuisance, it was not until the decision in *Kernochan* v. *N. Y. Elev. Co.* (1891), 128 N. Y. 559, that a doctrine peculiar to New York was formulated. That case held that where a lease of premises was made subsequent to the construction of an elevated railroad the right of action was exclusively in the lessor, as it was to be presumed that the damages caused by the railroad had been allowed for in fixing the rent. No authorities for the establishment of such a presumption were cited, except two early Massachusetts cases, *Baker* v. *Sanderson* (1826), 3 Pick. 348, and *Summer* v. *Tileston* (1828), 7 Pick. 198, in which there was a reduction of the rent by express agreement during the term on account of the nuisance. The actual grounds of decision in the *Kernochan case* seem to have been that it was no to be supposed that the structure complained of would be removed during the term, and therefore the lessee received and paid for the property in its im-

paired condition. These views were reaffirmed not only in other elevated railroad cases, *Kernochan* v. *Manhattan Ry. Co.* (1900), 161 N. Y. 339, but were also believed, by the lower courts, to apply to all cases of continuing nuisances, *Yoos* v. *City of Rochester* (1895), 92 Hun. 481. The New York rule was thus virtually declared to be that a tenant who comes to a nuisance has no rights at law, whatever may be his standing in equity.

This remarkable conclusion had never been suggested by the English cases, which make no distinction in this respect between a tenant and a purchaser. *Elliotson* v. *Feetham* (1835), 2 Bing. N. C. 134; *Bliss* v. *Hall* (1838), 4 Bing. N. C. 183. Nor is it recognized in American jurisdictions. *Sherman* v. *Fall River Iron Works* (1861), 2 Allen, 524; *Smith* v. *Phillips* (1871), 8 Phila. 10; *Halsey* v. *Lehigh Valley R. R. Co.* (1883), 45 N. J. L. 26. It appears, indeed, to rest on an entire inversion of the theory of nuisance. A lessee takes his estate with all the easements and rights of light and air thereto belonging, and a disturbance of these rights must be an injury to him. To presume him to have bargained away his right of action in advance is to derogate from the terms of the lease and indulge in arbitray speculation as to the intention of the parties. Decrease in rent or rental value is a matter of fact, and evidence of damages, not the cause of action itself.

Bly v. *Edison Electric Illuminating Co.* represents a return by New York to the sounder view, and a restriction of the rule of presumtion laid down in the *Kernochan case* to the special circumstances there found to exist. The *Kernochan case* was distinguished, partly on the ground that an elevated railroad involves the appropriation of an easement rather than the existence of a true nuisance; partly, also, because there was a structure necessarily permanent, unlike the ordinary nuisance, which should never be deemed permanent in theory of law. The latter reason suggests the best basis for a distinction. Though a nuisance may be permanent in the sense that it is likely to continue till abated, yet it is abatable at any time. But an elevated railroad company, or other corporation exercising a quasi-public function and possessing the right of eminent domain, cannot be compelled to cease its operations. All that can be done is to compel it to pay for the property rights it has appropriated. Hence its interferences with the use of property have more than the permanence of the ordinary nuisance; they are really perpetual. In such cases the rule of the *Kernochan case* might be allowed to stand as reasonable and practically just.—*Columbia Law Review.*